Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

No. 74-1452

In the Supreme Court of the United States

OCTOBER TERM, 1975

HOSPITAL BUILDING COMPANY, PETITIONER

v.

TRUSTEES OF THE REX HOSPITAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

ROBERT B. REICH,
Assistant to the Solicitor General,

BARRY GROSSMAN,
ROBERT B. NICHOLSON,
JOHN J. POWERS, III,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

INDEX

	Page
Interest of the United States	1
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:

Apex Hosiery Co. v. *Leader*, 310 U.S. 469	7
Atlantic Cleaners & Dyers v. *United States*, 286 U.S. 427	6
Burke v. *Ford*, 389 U.S. 320	4, 5, 9
Goldfarb v. *Virginia State Bar*, 421 U.S. 773	6, 7, 8
Gulf Oil Corporation v. *Copp Paving Company, Inc.*, 419 U.S. 186	5, 7
Heart of Atlanta Motel v. *United States*, 379 U.S. 241	7
Katzenbach v. *McClung*, 379 U.S. 294	7
Lehrman v. *Gulf Oil Corporation*, 464 F. 2d 26, certiorari denied, 409 U.S. 1077	8, 10
Lorain Journal Co. v. *United States*, 342 U.S. 143	8
Mabee v. *White Plains Publishing Company*, 327 U.S. 178	10
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219	8
Perez v. *United States*, 402 U.S. 146	7
Rasmussen v. *American Dairy Association*, 472 F. 2d 517, certiorari denied, 412 U.S. 950	8, 10

Cases—Continued	Page
United States v. *American Building Maintenance Industries*, 422 U.S. 271	7
United States v. *Darby*, 312 U.S. 100	7
United States v. *Employing Plasterers Assn.*, 347 U.S. 186	4, 8, 9
United States v. *Finis P. Ernest, Inc.*, 509 F. 2d 1256, certiorari denied *sub nom. Modern Asphalt Paving and Construction Co.* v. *United States*, No. 74-1219, October 6, 1975	8
United States v. *Frankfort Distilleries*, 324 U.S. 293	6, 7, 8
United States v. *Socony-Vacuum Oil Company*, 310 U.S. 150	9
United States v. *South-Eastern Underwriters Assn.*, 322 U.S. 533	6
United States v. *Wrightwood Dairy Company*, 315 U.S. 110	7
Wickard v. *Filburn*, 317 U.S. 111	7
Statutes:	
Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*:	
Section 1, 15 U.S.C. 1	2, 5, 7
Section 2, 15 U.S.C. 2	2, 5

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1452

HOSPITAL BUILDING COMPANY, PETITIONER

v.

TRUSTEES OF THE REX HOSPITAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This memorandum addresses the threshold question whether a conspiracy to block the expansion of a hospital which derives most of its goods and services, revenues and potential sources of borrowed funds from out of state, sufficiently affects commerce to come within the jurisdiction of the Sherman Act. Although this is a private damage action, the United States has a direct interest in the standard for determining the interstate nexus required for jurisdiction under the Act. Moreover, because the federal

government regulates many aspects of the health care industry and contributes substantial funds to hospitals such as petitioner, anticompetitive activity in this sector of the economy could significantly affect existing federal programs.

STATEMENT

1. Petitioner operates for profit a 49-bed proprietary hospital in Raleigh, North Carolina. Respondents, collectively referred to as the Raleigh Group, are a public, non-profit, hospital which is also located in Raleigh, two of its officers and an officer of the Health Planning Council for Central North Carolina (Pet. App. A-3, D-1). In its amended complaint,[1] petitioner alleged that beginning in 1970 and continuing through the present, the Raleigh Group violated Sections 1 and 2 of the Sherman Act by conspiring to prevent it from relocating and expanding its hospital facilities (Pet. App. A-3—A-4); that the Raleigh Group devised a scheme involving bad faith efforts to block authorization of the expansion, tactics to hold up implementation of petitioner's plans once authorization was gained, and malicious instigation of adverse publicity and general public antipathy (Pet. App. A-4); and that the purpose of this alleged conspiracy was to control the number of hospital beds, allocate patients and otherwise illegally restrain competition for medical-surgical hospital services in the Raleigh area (*ibid.*). The amended complaint further alleged that petitioner "is doing business in interstate commerce" and that the alleged conspiracy "has a substantial and direct effect on interstate commerce" (Pet. 7).

[1] The amended complaint was filed after the Raleigh Group moved to dismiss the complaint for lack of subject matter jurisdiction. The amended complaint contains detailed factual allegations concerning the interstate commerce issue.

The factual allegations in the amended complaint concerning interstate commerce are not disputed. Petitioner receives most of its revenue (95 percent in 1972) from insurance companies located in states other than North Carolina and from the federal government through medicare and medicaid programs (Pet. App. A-9, D-2); this amount will increase if the petitioner expands (Pet. App. A-18). Petitioner plans to finance the relocation and expansion of its facilities through loans obtained from one or more lenders located in states other than North Carolina; the estimated cost of this project is $4 million (Pet. App. A-18, D-2—D-3). Petitioner purchases approximately 80 percent of its medicines, goods and supplies from vendors located outside North Carolina (Pet. App. A-17, D-2). In 1972 these purchases totalled $112,846, not including food and kitchen supplies; this amount will also increase if petitioner expands (Pet. App. A-17). Petitioner is a wholly-owned subsidiary of a Delaware corporation having its principal office in Macon, Georgia; petitioner purchases management services from its parent for a fee based upon its gross receipts (Pet. App. A-17—A-18, D-2). In 1972, this fee was approximately $36,000 (Pet. App. A-18).

2. The district court dismissed the amended complaint on the ground that petitioner's involvement with interstate commerce is "incidental to the conduct of its principal business which is that of operating a hospital * * *" (Pet. App. D-3) and that that business "is strictly a local, intra-state business" (*ibid.*).

A divided court of appeals, sitting *en banc* (Pet. App. B-1), affirmed, on the ground that petitioner had failed to show that the alleged anticompetitive activity occurred in interstate commerce or that it had a substantial effect on interstate commerce.[2] As to the latter test, the majority reasoned that there was no showing that "the alleged conspiracy, even if successful, can affect interstate commerce in the detrimental manner that concerned Congress when it passed the Sherman Act" (Pet. App. A-10); that the economic consequences of the alleged conspiracy appeared to be negligible (*ibid.*); that the complaint had not alleged a "real danger, in a practical sense, of anticompetitive conduct to the flow of commerce, or the potential destructive power of a conspiracy" (Pet. App. A-12);[3] and that it did not allege that respond-

[2] A panel of the court of appeals initially had affirmed *per curiam* (Pet. App. C-1—C-2).

[3] The court recognized that this Court had never expressly applied such a test for jurisdiction under the Sherman Act but it concluded that "[s]uch an approach is implicit in the format and choice of words" in *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, and in *Burke* v. *Ford*, 389 U.S. 320 (Pet. App. A-12).

ents had the market power to drive petitioner out of business (Pet. App. A-13).

Three judges dissented on the ground that the majority's decision was inconsistent with *Gulf Oil Corporation* v. *Copp Paving Company, Inc.*, 419 U.S. 186. There, the dissenters noted, this Court had reaffirmed its previous interpretations of the broad scope of Section 1, and thus, "the question is whether Congress could reach the alleged conduct under the commerce power" (Pet. App. A-16). The dissenters concluded that the facts alleged in the amended complaint were sufficient to withstand a motion to dismiss because they established a substantial effect on interstate commerce.

ARGUMENT

1. Section 1 of the Sherman Act, 15 U.S.C. 1, prohibits every contract, combination or conspiracy "in restraint of trade or commerce among the several States * * *," and Section 2, 15 U.S.C. 2, prohibits monopolizing "any part of the trade or commerce among the several States * * *." Jurisdiction is established under the Act if the restraint occurs in or substantially affects interstate commerce. *Burke* v. *Ford*, 389 U.S. 320, 321. The court of appeals held that for there to be a substantial effect on interstate commerce there must be a "real danger * * * of anticompetitive conduct to the flow of commerce" (Pet. App. A-12), and the restraint must "affect interstate commerce in [a] detrimental manner * * *" (Pet. App. A-10).

Contrary to the court's ruling, a restraint may "substantially affect" interstate commerce without it having a substantial anticompetitive effect on such commerce. Jurisdiction is established if the restraint is imposed upon an activity (either local or interstate) which involves a substantial amount of interstate commerce. Accordingly, the magnitude of the anticompetitive effect upon such commerce is immaterial. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 785.

This Court has repeatedly recognized that in the Sherman Act Congress exercised the full sweep of its power under the Constitution. In *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435, the Court stated:

> * * * Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed.

In *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 558, the Court again concluded that the Congress that enacted the Sherman Act "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements * * *." In *United States* v. *Frankfort Distilleries*, 324 U.S. 293, 298, the Court said that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.' *Apex Hosiery Co.* v. *Leader*, 310

U.S. 469, 495." See also *Gulf Oil Corporation* v. *Copp Paving Company, supra; Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495; *United States* v. *American Building Maintenance Industries*, 422 U.S. 271.

Congress has broad power under the Commerce Clause to regulate intrastate activities that have a significant relation to interstate commerce. *Perez* v. *United States*, 402 U.S. 146; *Katzenbach* v. *McClung*, 379 U.S. 294; *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241; *United States* v. *Darby*, 312 U.S. 100; *United States* v. *Wrightwood Dairy Company*, 315 U.S. 110, 125. "[E]ven if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard* v. *Filburn*, 317 U.S. 111, 125.

Accordingly, the Sherman Act applies if the restraint affects a significant amount of interstate commerce, regardless of the competitive impact of the restraint. *Goldfarb* v. *Virginia State Bar, supra*, 421 U.S. at 784-785. In *Goldfarb*, which involved the legality under Section 1 of the Sherman Act of a minimum-fee schedule enforced by a state bar, the Court held that the fee schedule's restraint on legal services had a substantial effect on interstate commerce by virtue of the facts that a significant portion of the funds furnished for purchasing homes in the state came from outside the state and that a

significant amount of real estate loans was guaranteed by the federal government. In response to respondents' argument that there was no substantial effect on interstate commerce since there was no showing that home buyers were discouraged by this restraint or that fees were actually raised, the Court noted that no such showing was necessary, for "[o]therwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved." *Id.* at 785.[4] Indeed, contrary to the court of appeals' theory, this Court has indicated that the Act may reach unsuccessful restraints upon an activity that substantially affects interstate commerce. *United States* v.

[4] See also *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (agreement to fix price paid for California-grown sugar beets); *United States* v. *Frankfort Distilleries, supra* (agreement to fix local retail liquor prices); *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186 (combination to suppress competition among Chicago plastering contractors); *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (local advertising agreements used to injure competitor in interstate competition); *Lehrman* v. *Gulf Oil Corporation*, 464 F.2d 26 (C.A. 5), certiorari denied, 409 U.S. 1077 (single gasoline station's purchases of tires, batteries and accessories substantially affect interstate commerce so as to come within the Act); *Rasmussen* v. *American Dairy Association*, 472 F.2d 517 (C.A. 9), certiorari denied, 412 U.S. 950 (conspiracy to eliminate plaintiff's filled milk drink); *United States* v. *Finis P. Ernest, Inc.*, 509 F.2d 1256 (C.A. 7), certiorari denied *sub nom. Modern Asphalt Paving and Construction Co.* v. *United States*, No. 74-1219, October 6, 1975 (contractor who used approximately $9300 of materials obtained in interstate commerce in performing a contract obtained by means of a rigged bid comes within the Act).

Socony-Vacuum Oil Company, 310 U.S. 150, 224-225, n. 59.[5]

2. The alleged restraint here substantially affects interstate commerce.

According to the amended complaint, most of petitioner's medicines and supplies and all of its management services come from out of state. In 1972 these purchases totaled approximately $150,000. If petitioner expands its hospital, these purchases will increase significantly (Pet. App. A-17—A-18). Moreover, petitioner intends to finance its $4 million expansion through an out-of-state lender. Finally, out-of-state insurance companies and the federal government supply a substantial portion of petitioner's revenue (95 percent in 1972) (Pet. App. A-9, A-18, D-2—D-3).[6]

The amount of interstate commerce here affected by the alleged restraint is similar to that held "substantial" in comparable cases. See, *e.g.*, *Mabee* v.

[5] Contrary to the court of appeals' view, neither *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, nor *Burke* v. *Ford*, 389 U.S. 320, supports the proposition that there is insufficient involvement with interstate commerce unless the defendant by its restraint exercises substantial "anticompetitive power" (Pet. App. A-13). While the defendants in those cases may have possessed market power, that was not the rationale upon which the Court found jurisdiction under the Act. Rather, in both cases the Court found that the local restraint affected a significant amount of interstate commerce.

[6] The amended complaint also alleges that "[a] substantial number of persons regularly come from states other than North Carolina to the Raleigh area * * * hospitals" and that petitioner "regularly utilizes interstate communications * * * to carry on its business" (Pet. App. D-2).

White Plains Publishing Company, 327 U.S. 178, where the Court applied the Fair Labor Standards Act, a statute in which Congress did not exercise fully its power over commerce, to a newspaper only ½ of 1 percent of whose circulation was out of state; see also *Rasmussen* v. *American Dairy Association*, 472 F. 2d 517, 525-526 (C.A. 9), certiorari denied, 412 U.S. 950 (a conspiracy to eliminate plaintiff's business with yearly profits of only $36,720 substantially affects interstate trade); *Lehrman* v. *Gulf Oil Corporation*, 464 F. 2d 26, 34-35 (C.A. 5), certiorari denied, 409 U.S. 1077 (a single, small gasoline station's purchases of tires, batteries and accessories substantially affect interstate commerce).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

ROBERT B. REICH,
Assistant to the Solicitor General.

BARRY GROSSMAN,
ROBERT B. NICHOLSON,
JOHN J. POWERS, III,
Attorneys.

NOVEMBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 597900 131